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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1653

WALTER P. McFARLAND,
Petitioner,

against

ELIZABETH K. KNAPP, LESTER J. TANNER and ARTHUR S. FRIEDMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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and
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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Elizabeth K. Knapp,* Lester J. Tanner and Arthur S. Friedman, submit this brief in opposition to the Petition for a Writ of Certiorari herein.

Knapp, as assignee of claims for legal services rendered to Walter P. McFarland** and one Edward P. Johnson by Tanner & Friedman, was awarded judgment in the Dis-

* Sometimes referred to as "plaintiff".

** Sometimes referred to as "defendant".

trict Court for the Southern District of New York (Hon. Richard H. Levet, U.S.D.J.) on her first claim (in contract) for $77,500, with interest, and on her second claim (in contract) for $36,839.30, with interest, a total of $154,999.54. Alternative *quantum meruit* claims were dismissed as academic. The District Court dismissed on the merits all claims asserted by McFarland in a counterclaim against Tanner and Friedman.

After the filing of Judge Levet's original Decision, defendant's counsel advised the District Court by letter that its intention to enter judgment with respect to the First Claim was premature. The Court of Appeals noted App. A. p. 6a)* that McFarland complained that the District Court

> "* * * had failed to afford McFarland an opportunity to offer evidence with respect to the fairness and reasonableness of the $155,000 bonus, which was to be the subject of a deferred hearing. Thereupon Judge Levet, in a supplemental opinion dated July 9, 1971, stated his understanding that at the conclusion of trial the issue was to be decided on the evidence received without further hearing and made an additional finding to the effect that the $155,000 bonus agreement was fair and reasonable, stating the facts forming the basis of his finding."**

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* "a" references which are preceded with the designation "App. A," are to Appendix A, printed and bound together with the Petition for Writ of Certiorari. Other "a" references are to pages of the printed Appendix in the Court of Appeals. "Tr" references are to the Transcript of the trial. "Ex" references are to exhibits introduced into evidence at the trial, those followed with a number being plaintiffs' exhibits and those followed by a letter being defendant's exhibits.

** The facts and circumstances with respect to the original division of the trial and Judge Levet's later change of that direction are set out as part of Point I, *infra*.

Based upon the Court of Appeals' rewiew of the record, and with the exception of (a) its remand for a further hearing on the reasonableness issue related to the so-called bonus claim, and (b) directing a minor reduction of the recovery on the Second Claim, the unanimous Court (Hons. Irving R. Kaufman, Walter R. Mansfield, James L. Oakes, Circuit Judges) upheld Judge Levet's determination in all respects. It said (App. A, p. 7a):

> "• • • that Judge Levet's detailed findings, which reflect his usual painstaking analysis and appraisal of the evidence, are fully supported by substantial evidence. It is equally clear that the record before the district court called for rejection of McFarland's defense and counterclaim based on alleged action by Tanner and Friedman adverse to their clients' interest or in breach of their fiduciary duties."

Jurisdiction

Defendant's Petition for certiorari stands as a monument to the illusion that "say-so" can be the substitute for fact—that *ipse dixit* can synthesize jurisdiction. Thus,

(a) Although the Petition invokes high sounding words and phrases such as "appearance of justice", "due process", "the integrity of the judicial system", and "constitutional promises", and hints at "conflicts" between the decisions below and other determinations, the inescapable fact is that on its face, and even ignoring its improper statement of questions and the false factual predicates upon which they rest, the Petition utterly fails to present any color of meritorious ground for certiorari jurisdiction. To the contrary, this Petition is, on its face, a jurisdictional sham, representing nothing more nor less than a

refusal by the defendant to recognize that even he is not entitled to two appeals in the Federal system—that this Court does not function on certiorari as an automatic reviewer of the Court of Appeals. *Magnum Co.* v. *Coty*, 262 U.S. 159 (1923).

(b) In the effort to create some handhold by which he hopes to "[wipe] the slate clean" (Petition, p. 17), defendant has created a Petition which is a bog of statements made without record reference, statements which, on examination, contradict or materially bend the record, and statements of alleged evidence which have no antecedent in the record (or elsewhere for that matter). Thus, even if this Court were functioning as a Court of Appeals, it is clear that the existing decision was not only correct insofar as it affirmed the judgment of the District Court, but, in the respect in which it granted defendant still further opportunity to adduce evidence on the reasonableness issue, gave him far more than he had any right to obtain. In this posture defendant, least of all, has a right to complain.

The Petition in major respects distills to a petulant calumny of the District Judge and a repetition of the belatedly-created and then abandoned or rejected charges leveled against counsel. From this, Petitioner may derive some personal pleasure or satisfaction. But we submit it rises no higher than that.

With an awareness that this Court may well conclude that the Petition, on its face, requires instant denial, without more, we nevertheless set out hereinafter a Statement of his Case which, particularly in light of the enveloping unreliability of the Petition, will at least enable this Court to understand what did and did not happen in the Courts below, and the grounds upon which those matters rested.

Statement of the Case

The Court of Appeals found (App. A, p. 3a) that the essential background facts were set forth "accurately and in detail" in the District Court's opinion.

A. The Background of the Retainer

This action arose out of litigation conducted in the Southern District of New York, entitled *McFarland, et al.* v. *Gregory, et al.,* and legal services rendered to the plaintiffs therein (McFarland and Johnson) by Tanner & Friedman, a New York law firm. Defendant and two associates, Johnson and John Loughran, were in the early 1950's the sponsors and original owners of four vast, high-rise residential apartment buildings known as Arlington Towers (421a).

In 1957 certain agreements were made between defendant (and his associates) and the "Gregory Group". Ownership of Arlington Towers passed to the Gregory Group. Under the agreements, rights were given by the Gregory Group to reacquire one or more of the apartment buildings for a limited period of time and at certain formula prices (App. A, p. 25a; Ex. 1).

The Gregory Group repudiated its obligations. In 1957 defendant, Johnson and Loughran* started an action against the Gregory Group in the United States District Court for the Southern District of New York (App. A, p. 26a).

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* Defendant and his associates are sometimes, in the context of the *Gregory* litigation, referred to as the "Gregory plaintiffs". In the same context the Gregory Group is sometimes referred to as the "Gregory defendants".

In 1961, Hon. Edward J. Dimock, U. S. D. J., granted a decree of specific performance in favor of the Gregory plaintiffs (Ex. 19).

Defendant and Johnson, having acquired Loughran's interest, then prepared to go forward with efforts to reacquire the Arlington Towers apartment buildings. (106a, 107a, 147a, 174a). Their effort was immediately blocked—"frustrated" (App. A, p. 3a)—by the Gregory Group. This led to further proceedings before Judge Dimock. The Court made a supplemental judgment and further extended the time for exercise of the rights (Ex. 20).

The Judgment formula price for reacquisition of the Arlington Towers apartment buildings was a "bargain" price (105a-107a, 147a). After 1964 the market value of the buildings was, and was always said by defendant to be, at least $4,000,000 above the reacquisition formula price, (105a 106a, 107a, 147a).* Throughout the entire life of the rights, defendant indicated his primary objective was to reacquire the apartment buildings at the formula price (App. A, 26a; 106a, 107a, 147a, 174a, 246a, 146a).

B. The Retention of Tanner and Friedman

By September, 1964, it had been concluded that the Gregory Group would never voluntarily reconvey the apartment buildings at the formula price, or honor any other of the rights covered by the Court's judgments. A decision was made to institute further proceedings before Judge Dimock. Defendant and Johnson retained Tanner

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* The Court of Appeals said that defendant considered the formula price of $19.9 million "favorable since, according to his own estimate, he was obtaining buildings having a market value of $25 million" (App. A, pp. 4a-5a).

& Friedman in 1964 to enforce their claims and rights against the Gregory Group (App. A, p. 26a).*

The retainer was in writing. Defendant and Johnson—as joint clients—agreed with Tanner and Friedman that (as Judge Levet found (App. A, p. 27a) and the Court of Appeals agreed (App. A, p. 3a-4a)):

> "(a) The clients would pay for the legal services rendered on their behalf at the rate of $30 per hour for the partners' time, and $15 per hour for the time of associates. And
>
> "(b) The clients would pay for the disbursements expended in connection with the performance of such legal services; and
>
> "(c) In the event Tanner and Friedman achieved a good result * * * either by way of litigation or settlement (of the claims of the clients) there would be an upward adjustment of fees based upon achievement. [89a, 94a, 73a, 357a, 389a, Ex. 8, 111a-113a, 145a, 173a, 249a]"

The Court of Appeals noted (App. A, p. 3a) that the fee agreement was conceded by Defendant to be fair and

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* Defendant was represented by Gallop, Climenko & Gould at the time of the origin of the Arlington Towers project. Tanner was an associate and later a member of that firm. In the Gregory litigation, Defendant and his associates were represented by Parker, Chapin & Flattau. In the second proceeding before Judge Dimock, Gallop, Climenko & Gould represented the Gregory plaintiffs and Tanner participated therein. Friedman, although an associate and later a member of the firm of Gallop, Climenko & Gould, had no active connection with the matter at that firm. On March 1, 1963, Tanner and Friedman left Gallop, Climenko & Gould to form their own law firm. (102a, 104a, 171a, 172a).

reasonable to the "clients" (App. A, p. 27a; 73a, 83a, 84a, 89a).*

C. Tanner and Friedman's Activity for the Clients

In March, 1965, Tanner and Friedman applied to Judge Dimock for relief on account of the defaults of the Gregory Group. The application was opposed by the Gregory Group (App. A, p. 27a; 137a-139a). Beginning in April, 1965, in the presence of the District Judge, protracted settlement discussions were held, looking initially toward exercise of the apartment building acquisition rights (sometimes called the "Paragraph 9 rights"), and then to a possible overall settlement between the Gregory litigation parties (App. A, p. 27a; 132a-139a). Under the contemplated overall settlement, the Arlington Towers apartment buildings would be reacquired for $18,425,000—conditioned, however, on the Gregory plaintiffs' release of all other rights and claims against the Gregory defendants. These included the right to a minimal profit participation of $1,000,000**, the right to share in C Ground sale proceeds***, the claim to an adjustment of the purchase price

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* The complete daily diary entries of each partner and associate, summaries of the services rendered, the firm's time records, disbursement records, billing records, copies of bills and statements, relating to Tanner and Friedman's representation of defendant and Johnson from January 1964 through June 1968, inclusive, were admitted into evidence as exhibits at the trial of this action (Ex. 6, 8, 12, 15, 34-57; 403a-409a).

** $1,000,000 was ultimately paid by the Gregory defendants (124a) after rejection of a $3,500,000 claim by the Gregory defendants against the Gregory plaintiffs, which was later affirmed by the Court of Appeals; 363 F. 2d 857 (2d Cir. 1966).

*** Which ultimately resulted in the recovery of $345,000; 373 F. 2d 393 (2d Cir. 1967).

by $700,088*, and the claim for parking privileges and monetary damages for the wrongful acts of the Gregory defendants in the period from April 1957 through August 31, 1965, the date of final conveyance (206a-207a, 116-167a, 189a, 234a, 250a)**.

In July, 1965, the formula price for the Paragraph "9" apartment building reacquisition was $19,900,000. The $1,500,000 reduction to the proposed overall settlement figure of $18,425,000 represented a lump sum payment for the release of these remaining rights and claims of the Gregory plaintiffs. McFarland was reluctantly willing to settle on the basis indicated because the Gregory defendants would not settle unless all claims were released. However, defendant had always expressed his view that it was more advantageous simply to reacquire the Paragraph 9 apartment buildings at the formula price, and remain free to pursue the other rights and claims against the Gregory defendants. In July, 1965, against the prospect of consummation of the proposed settlement, the clients met with Tanner and Friedman, agreed that a good result was at hand, and in response to Tanner and Friedman's suggestion of an additional fee of some $225,000, *defendant* and Johnson proposed that the additional fee be $155,000 (116a, 176a-177a, 188a-189a).

At the last minute, with permanent mortgage financing to support the reacquisition already arranged (and there-

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* This claim resulted in a judgment of $700,088 in favor of the Gregory plaintiffs in the District Court, which was reversed on appeal by the Court of Appeals, 373 F. 2d 393 (2d Cir. 1967).

** These claims, which were the subject of separate proceedings in the District Court and separate appeals to the Court of Appeals, did not result in any recovery for the Gregory plaintiffs; 376 F. 2d 12 (2d Cir. 1967), 425 F. 2d 473 (2d Cir. 1970).

fore in jeopardy), the Gregory defendants refused to consummate the proposed settlement (App. A, p. 27a; 140a, 141a, 148a, 161a).

On August 2, 1965, Tanner and Friedman applied to Judge Dimock to compel performance by the Gregory defendants of a straight Paragraph "9" sale of the apartment buildings (App. A, p. 27a). The application was accompanied by defendant's signed tender for the formula price of 19.9 million dollars, (less a credit of $1,000,000, claimed in exchange for a waiver of the $1,000,000 profit participation rights (App. A, 28a; 116a, 118a, 140a, 148a)). Between August 2 and 4, 1965, Tanner arranged for the Gregory plaintiffs to borrow an additional $1,000,000 to support a tender at the full formula price of $19,900,000 in anticipation that the District Court would require the additional $1,000,000 to be paid (App. A, p. 28a; 140a-141a). Judge Levet found that Tanner was instrumental at that "critical time" in obtaining the additional financing, which enabled McFarland "to achieve his objective—reacquisition of Arlington Towers after 11 years of litigation." (App. A, p. 61a; 141a).

The Court of Appeals and the District Court both found that on August 4, 1965, McFarland and Tanner agreed that if Tanner & Friedman were successful in forcing the Gregory Group to part with the buildings, the added counsel fee would be $155,000 (App. A, pp. 4a, 28a; 390a, 116a, 119a, 150a, 160a, 161a, 180a, 182a, 403a-409a, 272a, 245a, 283a, 268a-270a).

D. The Achievement

The Gregory defendants opposed the new application of August 2, 1965. Judge Dimock made certain key rulings in favor of the application. As a result, the Gregory defendants were "finally forced" to convey the Arlington

Towers apartment buildings at the formula price (App. A, p. 4a; 120a). No waiver, release or surrender of any other rights or claims by the Gregory plaintiffs was required as a condition of the conveyance (Ex. 18; 166a).

On August 30-31, 1965, the goal which defendant and Johnson had otherwise vainly pursued since 1957 was achieved. Arlington Towers was purchased by them at the formula price* (App. A, p. 28a; 357a, Ex. 64, 65; 95a, 120a, 141a, 142a, 166a, 251a). Title to the apartment buildings was taken in their individual names (Ex. 64, 65). Judge Levet and the Court of Appeals both found that Tanner and Friedman's efforts, capping almost twenty months of work, resulted in a "substantial economic benefit, that is, reacquisition for $19.9 million of property *valued by McFarland* at about $25 million" (emphasis in original) (App. A, pp. 4a, 5a, 61a; 105a-107a, 147a).**

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* The purchase was made without the necessity for defendant or Johnson to put up any money. A new first mortgage loan of $18,000,000 was made by The Equitable Life Assurance Society of the United States (which, under the applicable law, required an appraisal of at least $24,000,000 to support the loan). A new second mortgage loan of $2,000,000 was made by Empire Trust Company which increased its commitment from $1,000,000 to $2,000,000 in August 1965 on the basis of Tanner's arrangement for a guaranty of $1,000,000 from a finance company. The two mortgages provided $20,000,000 to McFarland and Johnson to cover the $19,900,000 formula purchase price (263a-264a).

** The District Court found that (App. A, p. 45a):

> "The prime objective of McFarland from the inception of his relationship with Tanner and Friedman was to obtain the conveyance of the Towers, which by McFarland's own estimation had a market value of about $25 million. Indeed, he devoted eleven years of litigation, including several appeals, to accomplish that objective."

E. The First Claim

After alleging the making by the clients of the retainer agreement in September, 1964, and the achievement of the goal of the clients, the Complaint alleged that in August, 1965, the clients and Tanner and Friedman fixed at $155,000 the additional compensation to be paid, and that McFarland failed and refused to pay any part thereof (66a-69a). The Court of Appeals noted (App. A, p. 5a) that Johnson "paid his share," including ½ of the $155,000 bonus.*

McFarland's Answer to the First Claim contained several important admissions. He conceded that the September, 1964, retainer agreement was fair and reasonable (App. A, pp. 3a, 27a; 73a, 84a, 89a). He conceded that he and Johnson "jointly and severally" retained Tanner and Friedman for the enforcement of the Gregory litigation rights, and that they were Tanner and Friedman's "joint clients" (67a, 73a, 89a, 94a, 357a, 389a, 111a-113a, 145a, 173a, 249a).** The District Judge noted that defendant also admitted (73a-74a, 249a):

> ". . . that after the aborted July settlement conference he agreed to pay Tanner and Friedman a

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* The District Court found that on April 23, 1969, Tanner and Friedman agreed with Johnson that Johnson would pay them $115,-115.31. This figure was one-half of the total principal sum claimed by Tanner and Friedman to be due from defendant and Johnson. Tanner and Friedman expressly accepted this partial satisfaction without prejudice to their claims and rights against McFarland for the balance of the $155,000 specific fee and certain unpaid time charges (App. A, p. 31a; 357a, 98a, 99a).

** The Court of Appeals referred to Tanner and Friedman's prosecution of the Gregory suit "on behalf of McFarland and Johnson, who were their joint clients at all relevant times." (App. A, p. 10a).

bonus if Arlington Towers was reacquired *for more than $18½ million* [73a, 249a]" (App. A, p. 45a) (Emphasis supplied).

Defendant's Answer admitted that (73a):

> "* * * *McFarland and Johnson agreed to pay Tanner & Friedman a bonus if Arlington Towers was reacquired from defendants in the Suit as follows*: (1) if reacquired for $18,425,000, a bonus of $155,000; (2) *if reacquired for more than $18,425,000*, a bonus of $155,000 less funds paid or owed to Tanner & Friedman for services prior to reacquisition provided that the financial condition of Arlington Towers made the payment thereof feasible." (Emphasis supplied).

Thus, what emerged from defendant's own pleading was an explicit concession—indeed it was an assertion—that he and Johnson had agreed to pay a bonus whether the reacquisition price was $18,425,000 or "more than $18,425,000". The difference between Tanner and Friedman and McFarland was not *whether* McFarland agreed to pay a bonus, but *how much of a bonus* he promised to pay.*

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* It was established that even under defendant's version of the bonus agreement, the bonus amounted to $97,282 (instead of $155,000). Accordingly, the minimum bonus recovery against McFarland would have been $48,641 instead of $77,500 awarded on the First Claim (Tr. 163, App. A, p. 21a).

The law is clear that this judicial admission is binding and conclusive upon defendant and constitutes a "waive[r]" of "any defense to the claim . . . to that extent." *Demuth Glass Mfg. Co.* v. *Early*, 131 App. Div. 203, 204 (Second Dept. 1909); *Friedman* v.

(Footnote continued on following page)

At trial, McFarland threw caution to the winds. Oblivious, or indifferent, to the binding admissions of his Answer he testified categorically that after the proposed settlement aborted on July 30, 1965, he never agreed to pay *any* additional fee to Tanner and Friedman.* He took

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(*Footnote continued from preceding page*)

Blauner, 219 App. 326 (First Dept. 1927); *Paige* v. *Willet*, 38 N. Y. 28, 31 (1968). Thus, as to $48,641 of the $77,500 involved in the first claim there never was an issue under any circumstances.

Furthermore, defendant's Petition proceeds throughout on the silent premise that the issue of the deferred hearing affected the entire Judgment, including the amount awarded on the Second Claim. Of course, that convenient assumption overlooks the fact that it was conceded that there was no issue of fairness on the Second Claim (App. A, p. 30a). The Court of Appeals' remand had nothing whatever to do with the Second Claim of the Complaint. Neither did it have to do with the dismissal on the merits of the counterclaim.

* Judge Levet recognized that McFarland's trial position rested upon an attempt to escape from the binding force of his judicial admissions. Judge Levet said (App. A, p. 44a):

> "2. *Claim That McFarland Would Not Have Agreed to Payment of a Bonus If Reacquisition Required More Than $18,425,000*
>
> Another major contention that McFarland has advanced to dispute the claim that he agreed to the bonus is his assertion that when the contemplated $18,425,000 settlement with the Gregory defendants collapsed, the reason for payment of the additional fee had disappeared. He claims that if he had to pay more than that settlement figure, there was no reason to consider paying Tanner and Friedman a premium [242a].
>
> In analyzing this position, the critical fact to note is that by August, 1965, McFarland knew that he would have to pay $19,900,000 in order to purchase Arlington Towers.
>
> * * *

(*Footnote continued on following page*)

the position that once the proposed settlement was lost, "there was no reason to consider paying Tanner and Friedman a premium" (App. A, p. 44a); that the matter of an additional fee was a "dead issue" (263a); that he had told Tanner of his position; that a reacquisition of the apartment buildings at the formula price was not a good result (245a); that the suggestion that he had agreed to pay a $155,000 additional fee for reacquisition of Arlington Towers at the full formula price was "the craziest thing I have ever heard in my life" (242a). Judge Levet, in a series of Findings and Conclusions which were not even the subject of the appeal to the Court of Appeals, rejected McFarland's veracity, as much for its internal inconsistency and its contradiction by documents of his own creation, as for the contrary testimony of Tanner and Friedman (App. A, pp. 40a, 43a-48a). The Court of Appeals held (App. A, p. 4a):

> "The agreement to fix the bonus at $155,000 is supported by correspondence between Tanner and McFarland in August 1965, later oral and written confirmations of McFarland and Johnson, and testi-

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(Footnote continued from preceding page)

> Thus, by McFarland's own admissions, there at least must have been some reason to pay a bonus (however large or small) when the reacquisition price increased." (App. A, p. 44a).

The Court of Appeals noted (App. A, pp. 4a-5a):

> "Although McFarland grumbled about failure to achieve a settlement at the figure of $18,425,000, he was well aware at the time when he assented to the $155,000 bonus that the settlement called for payment of the formula price of $19.9 million, a price which he considered favorable since, according to his own estimate, he was obtaining buildings having a market value of $25 million."

> mony of Tanner and Friedman. * * * Furthermore, in seeking to defer payment of the fees due Tanner & Friedman including the bonus, [defendant] did not deny the existence of the agreement to pay the $155,000 bonus."

The heartland of the trial consisted of the extensive live oral testimony from defendant, from Tanner, and from Friedman, and the documentary evidence, on the basis of which Judge Levet ruled against McFarland and in favor of the plaintiff.

The District Court concluded (App. A, p. 28a):

> "On August 4, 1965, McFarland, on behalf of the 'clients,' and Tanner, on behalf of Tanner and Friedman, agreed that if the 'clients' reacquired the Arlington apartment buildings at the then Paragraph 9 formula price of approximately $19,900,000, the 'upward adjustment of fees' (pursuant to the September, 1964 agreement bonus clause) would be $155,000 [390a, 116a-119a, 150a, 160a-161a]."

The Court of Appeals agreed (App. A, pp. 4a-5a).

F. The Second Claim

The Second Claim sought to recover $37,614.31 (71a), representing one-half of unpaid disbursements and one-half of the unpaid balance of time charges for legal services rendered by Tanner and Friedman to defendant and Johnson after the Arlington Towers reacquisition. Those charges, at the rate of $30 and $15 per hour, included services rendered in further proceedings in *McFarland* v. *Gregory*, as well as services rendered in connection with the clients' ownership and operation of Arlington Towers (69a-71a).

Defendant's Answer admitted the agreement for payment of the time charges (App. A, p. 30a; 69a, 357a, 92a, 95a). He stipulated that the time charges were fair and reasonable (App. A, p. 30a; 74a, 84a), but challenged certain of them as being "padded" and others as being for "unnecessary and duplicative services." (App. A, p. 48a).

G. The Affirmative Defense

As an affirmative defense defendant pleaded that Tanner and Friedman performed services for interests adverse to McFarland, which constituted the representation of conflicting interests within the meaning of the Canons of Professional Ethics* (75a-76a).

At December 31, 1966, Tanner and Friedman were representing McFarland and Johnson in daily hearings before Judge Dimock on the so-called compensation claim (Ex. 12). The then-unpaid balance of fees for time charges and disbursements alone was $89,292.18 (413a). This did not include the $155,000 additional fee which had been fixed 17 months earlier, on which no payment had been made.**

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* Although the affirmative defense contained no specification of the acts relied on to support it, answers to interrogatories served in October, 1969 referred to the so-called Ernst Option and Tanner and Friedman's application to withdraw as McFarland's counsel in the Gregory litigation, events which took place respectively in March 1967 and January 1968.

** It was the agreement that time charges should be billed monthly and paid on a current basis (App. A, p. 30a; 390a, 69a, 357a, 92a, 95a). However, between September 1 and December 31, 1966, no payments on account of time charges for that period had been made despite requests therefor (412a-413a).

At a meeting held on January 31, 1967, defendant contrived a dispute with Tanner and Friedman about aspects of the fee arrangement (242a, 156a; Tr. 619). By mid-February, 1967, Tanner and Friedman were compelled to notify the clients that they would have to apply for leave to withdraw as counsel because the clients had failed to pay the substantial arrearage of fees and disbursements and McFarland was indicating a loss of confidence in their representation (412a *et seq.*, 153a, 70a).

Judge Levet found that throughout this period, defendant and Johnson were acting together, as the owners of and partners in Arlington Towers, and as men who were responsible for the payment of Tanner and Friedman's fees (410a, Ex. 64, 141a-142a, 196a, 211a, 212a).* Toward the end of February, 1967, realizing that defendant had not dealt with the fee problem and desiring to avoid counsel's withdrawal, Johnson met with defendant, and then called Tanner and Friedman (317a, 154a, 286a, 287a). He told them that as a result of his meeting with defendant he and McFarland agreed and were now prepared to make arrangement for payments on account of the unpaid fees and disbursements. He requested Tanner and Friedman to come to Washington to meet with him for that purpose (317a, 154a, 286a, 287a). Tanner and Friedman did so (154a).

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* Throughout the Petition (pp. 3, 4, 14, 20 and 21) defendant contrives to make it appear that he alone was Tanner and Friedman's client, and that he alone had rights to recapture the Arlington Towers property. That illusion deliberately overlooks the fact that the Answer admitted that defendant and Johnson jointly retained Tanner and Friedman, that the property was re-acquired by both clients and that, as the Court of Appeals noted, Tanner and Friedman "owed a duty to Johnson as a joint client." (App. A, p. 9a). and that "McFarland and Johnson * * * were [Tanner & Friedman's] joint clients at all relevant times." (App. A, p. 10a).

It is undisputed that throughout this entire period—indeed until a time some two months later—Tanner and Friedman had no reason to think that defendant and Johnson were having any difficulty with each other. Also, there was no evidence that any difficulty existed between the clients at that time, and McFarland so conceded (196a, 211a, 212a, 324a, 325a).

Johnson told Tanner and Friedman of the arrangements to which he and defendant had agreed (125a, 288a). A draft of a document to reflect that understanding was prepared (404a).

After Tanner and Friedman arrived in Washington, and (as Judge Levet specifically found), without any prior knowledge on their part (App. A, p. 52a; Tr. 431), Johnson informed them that McFarland had:

> "requested the preparation of an option for the sale of Arlington Towers to Ernst and Company [*], setting a purchase price of $3 million for McFarland's interests." (See: App. A, pp. 52a, 37a; 128a, 283a, 285a, 289a-290a).

Under the belief that their clients desired that they assist in the preparation of such a document—which was to be submitted the very next morning by Johnson to McFarland for his review—they assisted house counsel for Ernst in the preparation of a draft of option (App. A, pp. 37a, 50a; 195a, 281a, 283a, 285a, 288a-291a; Tr. 1214-15). That document was delivered by Johnson to McFarland (243a, Ex. A, Tr. 1142, 1215, 1242-1244). McFarland never signed the option (309a). Meanwhile, Johnson, in pursuance of the understanding which he told Tanner and Friedman had been reached by him and de-

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* In which Johnson was a principal stockholder.

fendant with respect to payments on account of the unpaid counsel fees, personally signed a letter reflecting that agreement, delivered a copy of the letter to McFarland and then made the first payment on account of unpaid time charges and disbursements (App. A, pp. 28a; 403a-409a, 245a, 268a, 270a, 283a, 288a).

The District Court rejected defendant's contention that Tanner and Friedman's activity with respect to the preparation of the Ernst option was a violation of their fiduciary duties (App. pp. 36a, 52a-53a, 55a-56a). The Court of Appeals agreed. It found "no merit" in defendant's charge (App. A, p. 15a).

Among other things, the District Court found that at the time in question, Tanner and Friedman did not represent Ernst (App. A, p. 36a). The Court stated:

> ". . . At that time they continued to represent the 'clients' exclusively and pursuant thereto, they with Joseph McCarthy, counsel for Ernst, drafted a proposed option for McFarland and Johnson which, if signed, would have entitled Ernst to acquire either or both of McFarland's and Johnson's interest in Arlington Towers. This option-draft was never signed by McFarland [357a, 95a, 410a, Ex. 64, Ex. 65, 120a, 141a-142a, 154a, 155a, 166a, 195a, 209a, 244a, 251a, Tr. 1093, 279a, 283a, 288a, 291a, 292a, 309a, 316a]."

The District Court took note of McFarland's contention that he had not requested preparation of the option (App. A, p. 53a). The District Court refused to credit this assertion, particularly in light of McFarland's written admission that he had earlier expressed to Johnson a desire to sell his Arlington Towers interest to Ernst (App. A, pp. 52a-53a, 56a; 428a, 297a-298a, 242a, 309a).

The District Court stressed that at the time Tanner and Friedman were and had been representing defendant and Johnson

> ". . . as co-owners in matters relating to the Virginia property." (App. A, p. 56a)

The Court added:

> "Neither Tanner nor Friedman communicated with McFarland while they were in Washington, D. C. on February 27—March 1, 1967. They had every reasonable expectation that in connection with the said option agreement they were representing the mutual interests of both Johnson and McFarland and that there was no reason to communicate separately with McFarland [170a, 208a, 281a, 285a, 286a, 287a, 289a, 317a]." (App. A, p. 37a)

> "Moreover, there is evidence to conclude that McFarland had indicated his own interest in the sale to Ernst & Co. Thus, there was further reason for Tanner and Friedman to believe that they were representing the interests of both clients in the drafting of the option." (App. A, p. 56a)

Moreover, the District Court found (App. A, p. 56a):

> "The fact that they dealt with only one of the co-owners in the preparation of the option hardly indicates a conspiracy against the rights of the other co-owner, even though Ernst & Co. was owned by Johnson. There is no evidence which indicates that Tanner and Friedman should, at that point, have realized that the relationship between McFarland and Johnson had been altered."

The District Court noted that the document drafted was nothing more than an option ". . . which was to be submitted to McFarland on the very next day for his review" (App. A, p. 56a).

Judge Levet capsulized McFarland's position as follows:

> "McFarland's position here comes down to a contention that Tanner and Friedman should have rejected a request by one of their clients to prepare a draft of an option for the submission to both clients. This concept of the duties of an attorney is difficult to accept." (App. A, p. 56a)

The facts with respect to, and the District Court's findings on, the second aspect of the affirmative defense—Tanner and Friedman's alleged representation of adverse interests in respect of their application in 1968 to withdraw as defendant's counsel in *McFarland* v. *Gregory*—are described at page 28, *et seq., infra.*

H. The Recasting of the Case

At this juncture, and because of their important impact upon the issues of the case, we summarize certain events which took place in the course of the pre-trial proceedings.

This action was commenced on June 16, 1969 (341a). Defendant, represented by the law firm of Baker and McKenzie, appeared and filed his Answer (341a). Interrogatories were served on behalf of plaintiff and answers given (346a). On January 23, 1970, the case was assigned for all purposes to Hon. Harold R. Tyler, U.S.D.J. (346a).

On February 2, 1970, plaintiff filed a Note of Issue on the basis that the parties had had reasonable opportunity to take discovery proceedings.*

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* In the almost six months after the last pleading had been served defendant had neither taken nor noticed any discovery proceedings.

On February 9, 1970, McFarland objected to plaintiff's Note of Issue. He said he had not had reasonable opportunity to take and complete necessary discovery. McFarland's counsel also informed Knapp's counsel that it was his view that Judge Tyler should disqualify himself from the case because he had been a member of a panel of the Court of Appeals which had heard one of the several appeals in the *McFarland* v. *Gregory* action. Although counsel had been told that Judge Tyler had stated that if his disqualification was desired it should be sought by motion (341a-342a), McFarland did not move to do so. To the contrary, defendant waited almost three months and then belatedly noticed the deposition of Knapp. When plaintiff moved to bar that discovery, defendant's counsel then wrote to Judge Tyler requesting that he disqualify himself (342a-344a). As a result, the action was transferred to Hon. Milton Pollack, U.S.D.J., on June 4, 1970 (343a).

In the course of an appearance before Judge Pollack, he scheduled a meeting of counsel and clients with the Court to canvass the possibility of settlement and, in the alternative, to set a time for prompt trial (343a).

On June 29, 1970, the parties appeared before Judge Pollack. Without any prior notice, it was announced that defendant had retained new counsel, Samuel N. Greenspoon, Esq. He immediately requested that Judge Pollack disqualify himself because such new counsel had been a prior employee of the law office previously conducted by the Judge (344a-345a, 338a-339a).

Plaintiff objected to any substitution of counsel in those circumstances, on the ground that it was clearly oriented toward the disqualification of the newly assigned Judge and to achieve further delay (344a-345a, 338a-339a). Judge Pollack filed a Memorandum, which stated, *inter alia*:

> "On June 29, an attorney appeared at the meeting and announced that he was now the new attorney for the defendant. He stated that he was consulted two days earlier, on Saturday, June 27, 1970 and then met the defendant for the first time on Monday, June 29, 1970. He did not mention who consulted him.
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> • • •
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> The proposed new attorney was, prior to September 28, 1967, associated as an employee in the law office previously conducted by the undersigned before taking judicial office.
>
> The plaintiff's attorney charged that the claimed substitution was arranged in bad faith and made in order to delay and hamper the proceedings herein including the purposes of the pretrial conference; that this was within a matter of a few weeks the second disqualification demanded by the defendant in this case." (338a-339a)

Judge Pollack concluded:

> "The selection of a substitute lawyer, on the day before meeting with the Court, of a former employee of the former law office of the undersigned, does not appear to have been accidental—nor was it claimed to be inadvertent on the part of the defendant. It must have been discussed and understood that said attorney's entry into the case would cause a disqualification of the Judge." (339a)

The matter having been referred by Judge Pollack to the Chief Judge, the Chief Judge then assigned the case for all purposes to Judge Levet (2a).

Judge Levet granted the application for substitution of attorneys (3a). In the course of the proceedings thereon

it was stated by McFarland and his counsel that the reason for the substitution was

> "that there has been a policy disagreement as to the conduct of the litigation between the defendant and Baker & McKenzie, Esqs. Baker & McKenzie, Esqs. felt that they could not comply with the new terms which the defendant wished to have pursued." (348a, 353a)

I. Defendant's Counterclaim

After the substitution of counsel defendant unfolded "the new terms which [he] wished to have pursued." At that late date, and without any attempt to explain why it had not been attempted long before (since all of the grounds sought to be pleaded had been known), defendant applied to Judge Levet for leave to file and assert a counterclaim against Tanner and Friedman (349a). Although the application was opposed on several grounds, and although it was clear that defendant would immediately seek to open new discovery proceedings, the District Judge granted the motion, realizing that defendant could, in any event, commence an independent suit against Tanner and Friedman with the prospect that two separate litigations, involving related issues, would then be simultaneously pending in the District for determination (App. A, p. 23a).

The counterclaim asserted the following charges (78a-79a):

> a) Tanner and Friedman falsified the number of hours which they and their associates expended with respect to the matter for which they had been retained by defendant and issued statements to defendant setting forth such falsified number of hours

and demanded and received payment in part therefor;

b) Tanner and Friedman charged the defendant for services which were unnecessary or which were duplicative of other services;

c) Tanner and Friedman performed services for interests adverse to defendant, without notice to the defendant thereof;

d) Tanner and Friedman attempted to deprive the defendant of his interest in the judgment obtained in the case entitled *"McFarland* v. *Gregory"* and attempted to vest part of defendant's interests therein in another of their clients, namely, Johnson;

e) Tanner and Friedman, without the consent of the defendant, supplied papers to Johnson, for use by Johnson in litigation between the defendant and Johnson;

f) Tanner and Friedman voluntarily testified on behalf of Johnson against the defendant in a litigation involving the matter for which they had been retained by the defendant and utilized information and material which they had acquired as a result of their representation of the defendant.*

The foundation of these charges was said by defendant's new counsel to be "highly suspicious circumstances" (354a-356a). The basis for the first two charges was new counsel's statement that it "defies credulity" (351a), and "appear[ed] to be incredible" (351a, 354a) that on certain days in the Fall of 1966 Tanner and Friedman, and certain of their associates, could have devoted the

* This charge was abandoned by the end of trial.

number of hours to the clients for which they had charged.

New counsel righteously proclaimed to Judge Levet that he recognized that these were serious charges (351a, 354a-357a). He said they required full examination and investigation so that if it developed that "suspicious circumstances were just that—and no more—" defendant could then withdraw such charges and not prejudice Tanner and Friedman in front of a jury* (351a, 354a-357a).

Defendant claimed that these matters entitled him to the return of *all fees* theretofore paid by him to Tanner and Friedman—some $122,000 (79a).

Judge Levet then gave defendant leave to depose Tanner and Friedman upon oral examination and this was done exhaustively (4a).

There was not at the trial a particle of evidence to support the proposition that defendant had been charged for any unnecessary or duplicative work, and Judge Levet so found (App. A, pp. 31a-33a, 48a-49a: Tr. 345, Tr. 391, Tr. 393, Tr. 745-6, Tr. 810, Tr. 827, Tr. 842-44, 164a, 159a, Tr. 563, Tr. 567, Tr. 825, Tr. 835, Tr. 843). There was not at the trial a particle of evidence to prove that a single hour of the more than 13,000 hours devoted by Tanner and Friedman and their associates to the representation of their clients' interests between 1964 and 1968 (Ex. 34, App. A, p. 30a; Ex. 12) had been falsely billed,

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* The foregoing piety was exploded at the opening of trial. For, still without a scintilla of evidence to support the slanders which had been leveled on "suspicion", defendant's new counsel said to the jury that defendant charged Tanner and Friedman with padding their bills and putting in useless extra work and that before the proof was over defendant would prove that Tanner and Friedman did so because they "had nothing else to do at the time." (Tr. 7).

and Judge Levet expressly so found (App. A, pp. 30a, 48a-49a, 31a, 32a). The utter baselessness of those charges was further confirmed by the fact that on his appeal to the Court of Appeals defendant did not even suggest that their dismissal was error. See: App. A, p. 7a.

Beyond the rejection of the foregoing charges the District Judge also found against defendant on every other charge of unethical conduct set out in his Counterclaim. The proof on these matters, and the District Court's and the Court of Appeals' conclusions with respect thereto, showed the following:

The trial of the *Gregory* compensation case continued before Judge Dimock on a virtually daily basis from December 1966 through July of 1967 (Ex. 12). Defendant and Johnson appeared in New York and gave extensive testimony (Ex. 12). Sometime in or about April, 1967, Tanner and Friedman learned that disputes had arisen between their clients with respect to Arlington Towers (App. A, pp. 7a, 35a; 196a, 278a-279a).

When Johnson tried to speak to Tanner and Friedman about those difficulties, they told him that they could not become involved in any dispute between their two clients and that if he felt it necessary to have advice he should obtain counsel (196a-197a, 332a-333a). In light of the fact that so many law firms in the Washington, D. C. and Arlington, Virginia area had prior connection with the extensive litigation between the McFarland group and the Gregory Group (Tr. 1101, 330a-333a), and that an unwitting communication by Johnson with such counsel might seriously prejudice the pending *Gregory* proceedings, Tanner and Friedman agreed to refer Johnson to counsel who would not have any prior involvement (App. A, p. 57a; Tr. 1101, 330a-333a, 197a, 213a). The District Court labeled defendant's claim that this was unethical as "frivolous" (App. A, p. 57a). The District Court held:

> "Equally frivolous is McFarland's reliance upon the fact that Tanner and Friedman supplied Johnson with the name of an attorney to whom he could speak in relation to his problem with McFarland. This was merely part of Tanner and Friedman's effort to avoid being drawn into the Virginia dispute themselves and thereby avoid any possible ethical impropriety." (See: 134a, Tr. 110, 196a-197a, 330a-333a).

The Court of Appeals concluded (App. A, p. 9a):

> "We agree with Judge Levet's conclusion that Tanner and Friedman did not place themselves in the position of representing interests adverse to their representation of McFarland in his suit against the Gregory group. Their reference of Johnson to a reputable attorney whom he could consult regarding his differences with McFarland . . . did not conflict with their duty to McFarland. . . ."

In November 1967, without any advance notice to Tanner and Friedman (App. A, pp. 8a, 51a; 197a, 198a) defendant, by Washington, D. C. and Arlington, Virginia counsel, began an action in Virginia against Johnson (421a, 278a-279a). Therein he sought a recission of an agreement which he said he had made with Johnson in August 1965, whereunder Johnson allegedly had for the first time acquired an interest in the Arlington Towers rights (421a-433a). According to McFarland's Virginia complaint, Johnson had no interest in the Agreement with the Gregory Group which was the subject of the *Gregory* litigation, prior to August 1965, with the exception of his personal apartment at Arlington Towers (App. A, pp. 8a, 35a; 425a, 426a). On that basis McFarland prayed that

Johnson's one-half interest in Arlington Towers be conveyed to him (433a).*

Defendant's allegations with respect to Johnson's interest, and the date of its alleged origin, came as a "bombshell" to Tanner and Friedman (223a). For, as the defendants in the *Gregory* litigation instantly perceived when they learned about the Virginia action, these allegations were inconsistent, on a materially substantive issue of fact, with McFarland's and Johnson's testimony and affidavits in the New York *Gregory* litigation. In that litigation there was then pending before Judge Dimock the Gregory defendants' motion to dismiss at the end of the Gregory plaintiffs' case (App. A, p. 37a; 480a, Tr. 1271, 200a).

The District Court found that (App. A, p. 51a):

> "Tanner and Friedman reasonably believed that McFarland's complaint had complicated, if not jeopardized the Gregory judgment."

The Court of Appeals held (App. A, p. 8a):

> "Upon learning of the lawsuit Tanner and Friedman believed in good faith that, since the allega-

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* Judge Levet commented upon McFarland's effort to make it appear that he and Johnson were somehow akin to unrelated, simultaneous clients. He said (App. A, p. 55a):

> "McFarland's argument seems to be based on a contention that Tanner and Friedman represented McFarland and Johnson as clients with separate and distinct interests in Arlington Towers. However, it is quite apparent from the record *and, in fact, stipulated at the trial (TR-I-86)* [89a] that McFarland and Johnson acted jointly in the retaining of Tanner and Friedman to represent their *mutual interest* in Arlington Towers." (Emphasis supplied)

The Court of Appeals pointed out (App. A, p. 9a) that defendant "overlooks the fact that [Tanner and Friedman] owed a duty to Johnson as a joint client."

tions as to ownership interest were inconsistent with testimony in the New York suit against the Gregory group to the effect that Johnson owned an interest in the Arlington Towers rights, the claims made on behalf of McFarland and Johnson in the New York suit might be jeopardized."

When Tanner and Friedman learned of the content of McFarland's Virginia complaint they did two things. First, they sought as promptly as possible to have a meeting with their two clients and their respective Washington and Virginia counsel to discuss and consider the possible impact of the Virginia action on the pending New York action (App. A, pp. 8a, 35a; 219a-220a).

Second, in fidelity to their obligation to protect the representation of their clients in the New York *Gregory* litigation, Tanner and Friedman attempted to prevent any expansion of the adverse impact from the Virginia action by notifying both parties and their counsel that they would be willing to look at any further proposed Virginia pleadings for the sole purpose of advising McFarland and Johnson and their counsel whether there was any factual inconsistency between such proposed pleadings and the proof already adduced in the Gregory action in New York (App. A, pp. 8a, 35a-36a; 198a-200a). Although McFarland and his counsel declined so to do, Johnson and his counsel did submit to Tanner and Friedman a draft of Johnson's answer to McFarland's Virginia complaint. Tanner and Friedman notified McFarland and his Virginia counsel and others at the first meeting held by them thereafter that they had read a draft of the Johnson answer (App. A, p. 8a; 198a, 199a-200a).

The District Court found (App. A, p. 52a):

> "It was for the purpose of avoiding jeopardizing the very litigation which Tanner and Friedman had been retained to prosecute that led to the advice by Tanner and Friedman to McFarland and Johnson (and their Virginia counsel) to permit the New York attorneys to examine the pleadings and analyze whatever implications might arise [198a-201a]."

The District Court continued by saying that had Tanner and Friedman not done what they did they ". . . may well have been remiss in their duties . . ." (App. A, p. 52a).

After noting that Tanner and Friedman's offer to review the pleadings of both sides in the Virginia action ". . . was done merely to avoid having papers submitted in the Virginia action which would compromise their clients' position in the New York action," Judge Levet concluded (55a):

> "The evidence failed to disclose that Tanner and Friedman assisted in the preparation of the drafts or did anything except to read the documents with a view of preserving what they believed to be the mutual interests of McFarland and Johnson in the Gregory action [198a-201a]."

The Court of Appeals held (App. A, p. 9a):

> "When McFarland made statements in his Virginia lawsuit that were seemingly inconsistent with his position in the New York action, it was not unreasonable for Tanner and Friedman to offer to review any further pleadings or statements made in the Virginia suit, or to confer with their clients regarding the possible impact of inconsistent statements . . ."

Counsel for Johnson and counsel for McFarland in the Virginia litigation requested that Tanner and Friedman supply them with copies of certain documents (Ex. K, 279a, 333a-334a). This was done by Tanner and Friedman in what was to them performance of their obligation to give their clients such papers as were in their possession and which related to their representation. The documents supplied to Johnson were copies of matters of public record and the instruments pursuant to which McFarland and Johnson had acquired Arlington Towers on August 31, 1965 (App. A, p. 8a; Ex. K, 281a, 279a, 333a-334a).

The District Judge rejected this specification of adversity as "unsubstantial" (App. A, p. 56a). The Court held (App. A, p. 56a):

> "McFarland's other contentions as to representation of adverse interests are equally unsubstantial. He points to the fact that Tanner and Friedman supplied Johnson or his attorneys in the Virginia action with certain papers. These papers pertained to the 1965 acquisition of Arlington Towers and were papers of record in the Gregory litigation. Since Tanner and Friedman represented both McFarland and Johnson in that matter, Johnson had every right to those papers. Failure by Tanner and Friedman to supply those papers might in fact have amounted to a breach of their professional duties."

The Court of Appeals agreed (App. A, p. 9a).

By the end of December 1967, Tanner and Friedman had still not been able to have McFarland and his Virginia counsel attend a meeting together with Johnson and his counsel to consider the impact upon the *Gregory* liti-

gation of McFarland's newly commenced Virginia action. Meanwhile, the Gregory defendants in the New York District Court action, having learned of the Virginia action, made an application to Judge Dimock asking him to reopen the proceedings to allow McFarland's Virginia complaint to be put into evidence on the ground that its allegations were inconsistent with testimony previously given by McFarland and Johnson in support of the claims against the Gregory Group in the New York action (App. A, pp. 8a-9a, 50a; 97a).

Tanner and Friedman were finally able to meet with their clients and their Virginia counsel on January 4, 1968. Judge Levet and the Court of Appeals noted that they were then "* * * given conflicting instructions by McFarland and Johnson as to the approach to utilize in opposing the Gregory defendants' motion [124a, 312a-313a, 328a]" (App. A, pp. 9a, 50a).*

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* The District Court noted *inter alia* (App. A, p. 50a):

> "The application to withdraw as counsel was made in January, 1968, after and as a result of McFarland's Virginia suit against Johnson claiming that McFarland alone was the exclusive owner of the Memorandum rights in Arlington Towers prior to August 31, 1965. Despite this assertion, the record in the Gregory proceedings in this Court reveals that McFarland had testified therein that other persons, including Edward Johnson, had an interest in those rights (see testimony of McFarland at the following pages in the Gregory "compensation" case: pp. 15,010-15,012, 15,022-15,023, 15,565-15,566). Hence, the immediate effect of the commencement of the Virginia action on the Gregory suit was a motion by the Gregory defendants to reopen their case to apprise the Court of McFarland's apparently inconsistent positions (see Gregory compensation case, pp. 16,617 *et seq.*)" (See: 386a-388a).

This led to Tanner & Friedman's withdrawal application, which Judge Levet (and the Court of Appeals, App. A, p. 9a) noted was made upon a two-fold basis:

> "* * * (1) there was a conflict of interest between their then clients and (2) conflicting instructions from McFarland and Johnson to Tanner and Friedman pertaining to the conduct of the Gregory action and the response to be made to the said motion to open [96a, 97a, 434a, 493a, 499a, 124a, 157a, 219a, 312a, 326a, 327a]." (App. A, p. 37a)

Judge Levet found that under the circumstances which existed, the making of the withdrawal application was a reasonable, perhaps obligatory matter. He concluded (App. A, p. 51a):

> "Under the circumstances, then, it was reasonable, and perhaps obligatory, for Tanner and Friedman to notify the Court of their predicament * * * [T]he motion to withdraw was not precipitated by their own conduct, but, rather, by their clients' action . . ."

The Court of Appeals came to the same conclusion (App. A, p. 9a):

> "When McFarland made statements in his Virginia lawsuit that were seemingly inconsistent with his position in the New York action, it was not unreasonable for Tanner and Friedman . . . when they received conflicting instructions, to move for withdrawal as counsel."

Finally, the District Court disposed of defendant's claim, often-repeated in the Petition as well (see: pp. 12, 13, 14, 20 and 21), that Judge Dimock had ruled, and

that Tanner and Friedman had tried to get Judge Dimock to change his ruling, that Johnson had no interest in the rights against the Gregory Group. Judge Levet stated (App. A, p. 57a):

> "McFarland's contention here is that this application was not so much a withdrawal as an attempt by Tanner and Friedman to have the Judge [Dimock] rule that Johnson had an interest in the New York action. This is not supported by the evidence. Tanner and Friedman were faced with an obvious rift between their clients and it was counsel's belief that if they continued to represent both McFarland and Johnson they might be opening themselves up to charges of the exact sort that are now being levelled against them. Thus they sought to be relieved."

As Judge Levet held, and the record completely supported, Judge Dimock made no ruling, and said he made no ruling, as to whether Johnson did or did not have an interest in the Memorandum Agreement rights (492a, 493a, 498a, 502a).* Judge Levet noted that it had been held by Judge Dimock (App. A, pp. 38a-39a):

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* On May 13, 1971, while the case was *sub-judice* before Judge Levet, Tanner and Friedman moved by Order to Show cause (366a) to reopen the case to allow the introduction into evidence of portions of a Decree and Decision (373a-385a) rendered by the Virginia Circuit Judge who presided at the trial of McFarland's Virginia litigation against Johnson. Although the Decision recognized, as did Judge Levet (App. A, p. 25a), that the Gregory agreement rights were in McFarland's name alone, it rejected McFarland's claim that Johnson had no interest in them prior to August 1965 and held that they were jointly owned by McFarland and Johnson. Judge Levet denied the application to reopen, without prejudice to its renewal after final Judgment in the Virginia action was entered (5a). Judge Levet's Opinion after trial was issued before the application could be renewed.

"(1) that the rights prosecuted in the Gregory action in New York were in McFarland's name although ownership thereof might have been shared with others [497a, 502a-503a].

(2) that the interests of McFarland and Johnson *inter sese* were not then and had not theretofore been before the District Court (Southern District of New York) for determination and would not be determined therein [490a, 492a-493a, 499a-500a, 502a], and

(3) that there was no conflict between the prosecution of the rights against the Gregory group and the *inter sese* dispute between McFarland and Johnson in the Virginia action with respect to ownership thereof [490a, 492a-493a, 499a-500a, 502a-503a, 508a-509a, 516a]."

Judge Levet concluded on this subject by finding (App. A, p. 36a):

"Tanner and Friedman did not place themselves in a position of representing interests adverse to their representation of McFarland in respect to

* * *

(d) Tanner and Friedman's application to withdraw as counsel for McFarland in the Gregory action or any other aspect of the Gregory suit."

The Court of Appeals agreed (App. A, p. 9a).

ARGUMENT

POINT I

In light of defendant's absolute and unconditional waiver of jury trial, and in light of the Court of Appeals' remand to the District Court for a further hearing on the issue of reasonableness, petitioner's first two questions are patently frivolous and present nothing for review by this Court.

In his unrelenting, and unending, effort to avoid a finish to this litigation, Petitioner presents as his first Question a claim that, since he allegedly was "misled" by the District Court ("advertently or inadvertently")* to waive a jury trial, and allegedly did so "on the express condition and understanding that [the allegedly deferred] issue should continue to be deferred for separate trial" (Petition, p. 2), the failure of the District Court to grant Petitioner the deferred hearing prior to the original entry of judgment irremediably vitiated the jury waiver and entitled defendant to a new trial before a new judge and jury on all issues, whether or not they had anything to do with the deferred issue and whether or not defendant even appealed from their adverse determination.

Of all the "frivolous" arguments advanced by the defendant in the Court of Appeals (and there were many, as the Court explicitly stated—App. A, p. 10a), this *ad hoc nostrum* is outstanding. Not only was and is the argument (and hence the Question) founded on a blatantly false factual predicate—jury trial was absolutely and unconditionally waived—it was as well refuted by the fact that the very thing of which defendant complained

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* Petition, pp. 17-18.

was granted to him by the decision of the Court of Appeals.

Having been given by the Court of Appeals precisely what he said he was entitled to have had, defendant is left only with the cavil that the Court of Appeals should not have remanded the matter *to Judge Levet* for further hearing, and that, in any event, the Court of Appeals "severely limited" and "rigidly circumscribed" his rights at the further hearing (Petition, pp. 9, 16). These contentions are transparent sham, in fact and otherwise.

We shall set out the facts which make clear that there were and are several sound and compelling reasons why, in the circumstances here, defendant was not even entitled to any further hearing on the reasonableness issue, and that, in any event, having now been granted such hearing by the Court of Appeals he has no basis whatever for any complaint with reference thereto. We shall also show that, in any event, as defendant's counsel virtually conceded at the oral argument in the Court of Appeals, the attempt to resurrect a jury trial is disingenuous.

a. Preliminary matter: the underlying substantive law.

The law in New York is that where attorneys begin to render services to clients and then, after the services are under way, for the first time reach an agreement about fees, such agreements are enforceable in exactly the same way as any other contract (Judiciary Law § 474), provided that the Court is satisfied that the agreement reached in the course of the representation was reasonable. The question of law is whether it can be said that the size of the fee is "unconscionable". The Court of Appeals agreed (App. A, p. 13a).

In *Gair* v. *Peck,* 6 N. Y. 2d 97, 106 (1959), the Court said that "unreasonable" and "unconscionable" mean the same thing in this context.

It is clear that the pertinent inquiry is *not* the same as a *de novo* determination of the value of the services as if by *quantum meruit. Werner* v. *Knowlton,* 107 App. Div. 158 (Fourth Dept., 1905); *Ransom* v. *Ransom,* 147 App. Div. 835, 848 (First Dept., 1911).

b. The state of the record as to the alleged deferred issue.

At the opening of the trial and before hearing the evidence offered by McFarland as to why he allegedly did not agree to pay the additional $155,000 fee, the Court ruled that it would defer hearing on the *quantum meruit* claims and the question of the reasonableness of the $155,000 agreement (83a-89a). Defendant claimed that the District Judge never changed that ruling and so argued in the Court of Appeals. Respondent argued to the contrary.

In the District Court, before it would permit the parties to rest their respective cases, Judge Levet said (335a-336a):

> "Before I put the question as to both sides resting, I want to have it definitely understood as to *what this trial so far is about* so there will be no misunderstanding.
>
> This involves all matters relative to this 30-15 (1381) cause of action, this relates to *all matters as to whether or not the $155,000 specific fee is sustained,* and, in the third place, it relates to all matters connected with the claim of McFarland

> with reference to adverse interests both as to a recovery of fees previously paid and as a defense." (Emphasis supplied.)

The District Court's clear caveat bespoke its recognition and its notice to "both sides" that what had already been put into evidence on the issue of the making of the agreement was the same material which would govern the question of reasonableness of the agreement and therefore "what this trial so far is about" permitted the Court to determine "all matters" as to whether "the $155,000 specific fee is sustained."

While Judge Levet indicated at times during the course of the trial that he had not yet concluded whether there would be necessity for trial of any deferred issues (207a), on the last day of trial he stated that his reservation of "any phases of the case which are not determined" did *not* mean that "there would necessar[ily] be some further hearings" and that he would canvass that situation after he determined the three issues (336a).

In the context of the District Court's clear statement about whether it would be necessary to have further hearings, the importance of the word "sustained" could not be diminished. For "sustained" is a word which encompasses more than the *making* of the $155,000 agreement. It included the issue of "reasonableness" without which the agreement would not be "sustained". The conjunctive use of the words "all matters" made the message even more unmistakable.

c. The arguments in the Court of Appeals.

Defendant's argument in the Court of Appeals came down to this. The District Court's words "all matters

as to whether or not the $155,000 specific fee is sustained" meant to embrace only the matter as to whether the $155,000 contract was *made*. Defendant made this same argument to the District Court (58a-62a), which rejected it (App. A, p. 60a). Thus, the question of what the District Court meant by its own words was answered. Defendant was left then only with the argument that the District Court changed its direction about the order in which it would try the issues. Since there is simply no question of the District Court's power to do this at any time before judgment, *Partmar Corporation* v. *Paramount Pictures Theatres Corporation*, 347 U. S. 89, 100 (1954); *De Gioia* v. *United States Lines Company*, 304 F. 2d 421, 424 (2d Cir. 1962), defendant argued that the Court's "warning at such late date" did not provide a hearing "at a meaningful time and in a meaningful manner". Of course, defendant made no objection whatever at the time such "late" notice was given to him—which was before the entry of judgment. Nor did such timing foreclose defendant from offering to adduce further evidence—which he did not do.*

Even if the District Court had never changed its original direction with respect to the order of trial of the issues, defendant was still entitled to no further hearing. For, as the District Court's decision made clear, and as the evidence overwhelmingly supported (and nowhere did defendant challenge the adequacy of the proof to support the District Court's findings and conclusions on these subjects), the factual criteria which were dis-

* Significantly, when defendant wrote to the District Judge *after* the rendition of the Opinion, Findings of Fact and Conclusions of Law—to call for the holding of the so-called deferred hearing—he never did tell the District Judge what, beyond evidence already adduced, he proposed to offer (58a-60a).

positive of the question of defendant's understanding of the $155,000 additional fee and whether it was reasonable, were necessarily bound up with and determined by the Court's decision on the issue of the making of the agreement. This was so because defendant pitched his defense to the claim that he had *made* the $155,000 agreement on the proposition that it would not have been reasonable in all the circumstances of the case for him to make such an agreement. Therefore, the circumstances surrounding the reasonableness of the agreement were put into evidence. In that situation, those findings were not open for relitigation.

The reasonableness of the $155,000 agreement, its conscionability, was determinable from the facts concerning the making of the agreement. *Blaikie* v. *Post,* 137 App. Div. 648, 650 (First Dept. 1910); *Matter of Gasco,* 27 App. Div. 2d 557, 558 (Second Dept. 1966); *Gair* v. *Peck, supra,* 6 N. Y. 2d 97, 124 (1959); *Matter of Fitzsimmons,* 174 N. Y. 15 (1903); *Werner* v. *Knowlton, supra,* 107 App. Div. 158 (Fourth Dept. 1905). These include the circumstances of the fee arrangements, the client's business acumen and understanding, his experience in dealing with counsel, whether the amount agreed upon was excessive in light of the amount of work done, the circumstances and objectives of the retention, and the economic benefits flowing from the performance. *Boyd* v. *Daily,* 85 App Div. 581, 585-6 (First Dept. 1903), aff'd 176 N. Y. 613 (1903); *Blaikie* v. *Post, supra; Ransom* v. *Ransom, supra,* 147 App. Div. 835, 848 (Fourth Dept. 1911); *Matter of Fitzsimmons,* 174 N. Y. 15 (1903); *Werner* v. *Knowlton, supra.*

The proof at the trial included:

> (a) The circumstances of the retainer (App. A, pp. 26a-27a; 73a, Ex. 3, 357a, 89a, Tr. 29-30, 89a, 389a, Ex. 8, 111a-113a, 145a, 173a, 249a).

(b) The objectives of the retention (App. A, pp. 26a-27a; 107a, 147a, 174a, 188a, 189a, 246a, 146a, 104a-105a, 112a, 142a, 247a, 525a).

(c) The prior history of unsuccessful efforts at achieving the clients' objective and the obstacles to counsel's achieving the clients' objectives (106a-107a, 109a-110a, 147a, 246a, 146a, 137a-140a, 141a, 161a, Tr. 399, 135a, 144a, 188a, 247a, 425a).

(d) The steps taken by counsel and the time devoted by them to the retention (Exs. 12, 34, 35, 36, 37, 47, 48, 54, 55, 56, 57, 124a-125a, 132a-141a, 141a-149a).

(e) The fact that counsel undertook the effort on minimal time charges at the suggestion of defendant, with the agreement for payment of additional compensation in the event of a good result (173a, 389a).

(f) All the conversations among the parties where the subject of fees was discussed (105a-118a, 144a-147a, 150a-152a, 160a, 173a-183a, 188a, 230a-242a, 249-251a, 254a-270a, 272a, 273a, 307a, 389a-397a, 403a, 407a-417a, 420a).

(g) All the correspondence on the subject of fees, among the parties and others who became involved in the matter (389a, 390a, 391a, 395a, 403a, 404a, 407a, 409a, 412a, 417a, 418a, Ex. 3, Ex. 5, Ex. 6, Ex. 15, Ex. 27).

(h) Defendant's admissions that he had agreed to pay $155,000 (App. A, pp. 28a-30a; 180a-181a, 182a, 407a, Ex. 27, 272a, 245a, 283a, 288a, 403a, 404a, 409a, 268a-269a).

(i) Defendant's testimony which claimed that there was no benefit resulting from the services (App. A, pp. 44a; 242a, 263a).

(j) The value of the apartment buildings and the significantly lower reacquisition formula price (105a, 106a, 107a, 147a, 112a).

(k) The economic benefit ("good result") involved in the acquisition of the apartment buildings for the formula price (105a, 106a, 107a, 147a, 147a-175a, 188a-189a, 108a, 112a, 118a-120a, 124a, 142a, 144a, 146a, 166a-167a, 205a, 247a, 250a-251a).

(l) Defendant's preference for a formula price acquisition of the apartment buildings, with reservation of all other rights and claims against the Gregory defendants (174a-175a, 188a-189a).

(m) Defendant's business background as investor, real estate developer, his acumen and understanding (421a, 104a, 106a, 112a, 125a, 134a-137a, 165a-166a, 184a, 185a, 229a, 398a-401a, Ex. 1).

(n) Defendant's experience over the years in dealing with a large number of prominent attorneys (104a-109a, 125a, 133a-136a, 139a, 144a, 162a, 163a, 165a, 166a, 169a, 171a-173a, 195a, 232a, 253a, 331a).

(o) Defendant's instructions to counsel on matters pertaining to the representation (App. A, pp. 49a; 164a).

Where a Court makes findings and conclusions on an issue based upon substantial evidence, those same matters may not be relitigated in connection with later trial of a second issue. *Partmar Corporation* v. *Paramount Pictures Theatres Corporation, supra,* 347 U. S. 89, 101 (1954); *Southern Pacific Railroad Company* v. *United States,* 168 U. S. 1, 48-49 (1897); *Irving National Bank* v. *Law,* 10 F. 2d 721, 724 (2d Cir. 1926); *Tillman* v. *National City Bank of New York,* 118 F. 2d 631, 633-34 (2d Cir. 1941).

Moreover, since a reason for separating issues for trial is that the determination of the first issue "may end the entire litigation", *Seaboard Terminals Corporation* v. *Standard Oil Co. of New Jersey,* 30 F. Supp. 671, 672 (S. D. N. Y. 1939), the bar against relitigation was particularly apposite here.

Finally, even in a jury case there is no bar to a determination by the Court that there is no genuine question of fact left for submission to a jury.* Once the evidence had been heard and ruled upon at the trial there was not, as a matter of law, any genuine issue of fact left for determination by anyone, jury or Court. *Fidelity & Deposit Co. of Maryland* v. *United States,* 187 U. S. 315 (1902); *Witsell* v. *Alexander,* 229 F. 2d 47, 49 (7th Cir. 1956); *Manara* v. *Potomac Electric Power Co.,* 268 F. 2d 793, 799 (4th Cir. 1959); *Engel* v. *Aetna Life Insurance Co.,* 139 F. 2d 469, 472 (2d Cir. 1943); *Hanno* v. *Mitchell,* 202 App. Div. 504, 518 (First Dept. 1922).

There was still further reason why defendant's argument was without merit. One of the issues at the trial dealt with whether a series of meetings and oral communications among defendant, Johnson, Tanner and Friedman, involved admissions of defendant's agreement to pay the $155,000 fee. Defendant denied that he ever admitted such agreement.

Likewise, there was an issue whether the periodic transmission by Tanner and Friedman to defendant of statements of account, showing the status of fee matters (including the $155,000 fee) and defendant's conduct after receiving those statements, constituted further admissions

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* Summary judgment is appropriate when the facts already in the record show that there are no genuine issues of fact to be tried. *Waldron* v. *Cities Service Co.,* 361 F. 2d 671, 672 (2d Cir. 1966), aff'd. sub nom. *First National Bank of Arizona* v. *Cities Service Co.,* 391 U. S. 253 (1968); *Engel* v. *Aetna Life Insurance Co.,* 139 F. 2d 469, 472 (2d Cir. 1943).

by him of the making of the $155,000 agreement.

The District Court held that this evidence proved that he had in fact made the $155,000 additional compensation agreement (App. A, p. 28a).

Beyond this, Judge Levet cited controlling New York law on the legal effect of his factual determinations that McFarland never disputed the several periodic statements of fees due including the $155,000 specific fee. Judge Levet quoted (App. A, p. 47a) from *Rodkinson* v. *Haecker*, 248 N. Y. 480, 485 (1928):

> "As a general rule where an account is made up and rendered, he who received it is bound to examine the same or to procure someone to examine it for him. If he admits it to be correct, it becomes a stated account and is binding on both parties. If instead of an express admission the party receiving it keeps the same by him and makes no objection within a reasonable time, *his silence will be construed into an acquiescence in its justness, and he will be bound by it as if it were a stated account.*" (Emphasis supplied).*

Although defendant asserted that the District Court made no findings in its original Opinion on the issue of fairness and reasonableness, Judge Levet in fact found in his original Opinion (App. A, p. 43a).

> "McFarland asserted that he did not remain 'silent' but expressed his protest to Tanner and Friedman. McFarland's recollection, however, was vague and confused and I am not impressed with

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* In New York, lawyers can recover on an account stated without proof of the underlying agreement or the reasonableness thereof. *Beck* v. *Greinert*, 29 App. Div. 2d 712, 713 (Third Dept. 1968).

> the credibility of these statements. Moreover, he admitted that he never expressed any objection to Johnson. Although McFarland was a prolific letter writer, he testified that he did not protest in writing to Tanner and Friedman until nine months after the fee statements were submitted to him."

Judge Levet held in his original Opinion (App. A, p. 46a):

> "McFarland, by his failure to reply to several periodic statements of fees due (including the $155,000 bonus), submitted by Tanner and Friedman, admitted the *propriety* of this charge." (Emphasis supplied).

In view of Judge Levet's finding that the silent, lengthy retention of the fee statements was a binding admission of their "propriety", respondents argued that a new hearing was not required to afford defendant the opportunity to show that the same fees were unreasonable in the same circumstances.

Finally, while McFarland sought to create some ground for overturning the unassailable correctness of Judge Levet's determination—by asking the Court to hold another hearing, the sole and exclusive objective of which (if McFarland were to prevail thereon) would be the making of findings and determinations absolutely reversing what Judge Levet had already determined—*he did not even appeal from Judge Levet's conclusions with respect to his admissions of the agreement and the consequences of his retention of the fee statements.*

d. The Court of Appeals' Decision.

The Court of Appeals' Decision acknowledged that a great deal of proof had been introduced by the parties

which was relevant to the reasonableness issue. The Court stated (App. A, p. 11a):

> "Notwithstanding the deferment of the reasonableness issue the parties did introduce a great deal of evidence with respect to the making of the $155,000 bonus agreement that would be relevant to reasonableness; including the circumstances and objective of McFarland's retainer agreement with Tanner and Friedman, i.e., the obstacles encountered by them, the time and effort expended in the prosecution of the Gregory suit, conversations among parties and counsel as to the bonus, the market value of buildings recovered, the economic benefit realized by McFarland as a result of counsel's efforts, McFarland's background as an investor and real estate developer, and his experience in dealing with other attorneys."

The Court of Appeals acknowledged that the District Court had the power to revoke its earlier direction for a split trial (App. A, p. 12a). It also conceded that the District Judge "* * * may have intended his closing statement to have this effect * * *" (App. A, p. 12a).

Nevertheless, to preclude any possibility that defendant was deprived of the opportunity to adduce proof pertinent to the issue, the Court remanded to afford defendant "* * * the opportunity to offer the foregoing additional proof and to argue that it calls for a contrary decision on the issue" (App. A, p. 13a).

Having inquired of and explored with defendant's counsel at oral argument what proof defendant desired to adduce (especially in light of respondents' contention that defendant had failed to suggest any proof which was to be presented at any further hearing), the Court of Appeals noted (App. A, p. 13a):

> "Although most of the essential proof as to conscionability may well have been received by the court in connection with other issues and McFarland not only cross-examined others but also testified personally with respect to circumstances bearing on reasonableness, he was not given the opportunity to introduce expert witnesses, and he may not have fully cross-examined Tanner and Friedman as to the issue."

The Court added (App. A, p. 13a):

> "In view of the extensive evidence already received that is relevant to the issue, we believe that McFarland should be limited upon the hearing to cross-examination of Tanner and Friedman and to the introduction of such expert witnesses as he may wish to offer."

Thereafter, by Petition for Rehearing, defendant brought before the Court of Appeals his complaint that the Court's Decision unduly limited him in respect of proof which he could offer at the mandated District Court hearing. The Court then held (App. A, p. 18a) that its Decision "* * * does not preclude the trial judge after receiving additional evidence authorized by us * * * from deciding in his discretion that further proof would be helpful on the issue of the reasonableness of the $155,000 bonus agreement."* *Sic transit* defendant's claim that the Court

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* It is significant to note defendant's complaint that under the Court of Appeals decision he was not given permission to testify at the deferred hearing. As the Court of Appeals found (App. A, p. 13), the defendant had already testified on these subjects. The decision on the Petition for Rehearing afforded ample opportunity

(Footnote continued on following page)

of Appeals "severely limited * * * what proofs he could offer * * *, rigidly circumscribed * * * the proof he may offer" (Petition, pp. 9-16).

Defendant also complains that the Court of Appeals "has ruled that plaintiff made a *prima facie* case" (Petition, p. 16). The Court of Appeals made no such "rul-[ing]" and this misstatement is simply another reflection of the lengths to which defendant will go in an effort to create some lever for an undoing of all of the proceedings which have gone before. The Court of Appeals was clear, and careful, in its appraisal of what had been done in the District Court. It said (App. A, p. 13a):

> "In remanding this aspect of the case for a further hearing and findings, we do not wish to imply that the court's finding of reasonableness was not supported by substantial evidence in the record as it now stands or that the additional proof (which we, of course, have not seen) will necessarily change the result. We simply believe that McFarland should have the opportunity to offer the foregoing additional proof and to argue that it calls for a contrary decision on the issue."

Finally, the insistent calumny against Judge Levet—the continuation of the attempts to eliminate any Judge who

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(Footnote continued from preceding page)

for defendant personally to testify. In light of his present complaint, would not candor have required that defendant reveal that when the further hearing was held before Judge Levet, defendant did not even personally appear to offer any testimony of his own. Indeed, at that hearing, after failing to produce an expert witness whom he had said would testify on his behalf, defendant's counsel characterized the Court of Appeals' determination to grant defendant an opportunity to offer expert witness as something which was "gratuitous"—something for which the defendant had not even asked.

would not accept defendant's *ipse dixit* for truth—is reflected by defendant's complaint that the matter should not have been referred back to Judge Levet. But, on the record of these proceedings and in light of the solicitude shown the defendant by Judge Levet and by the Court of Appeals, that claim is pure brass. The Court of Appeals said (App. A, p. 14a):

> "We are confident that the additional evidence will, together with that already introduced, be fairly considered by Judge Levet in making findings on the issue."

e. The parties absolutely and unconditionally waived trial by jury.

Defendant contends that the District Court's original failure to hold a further hearing on the reasonableness issue violated the condition of his consent to waive the jury and therefore the entire trial was a nullity.* Entirely apart from whether the Court of Appeals was right in directing a further hearing before Judge Levet, it is clear that defendant's claim of conditional jury waiver is flatly contradicted by the Record.

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* The utter sham of defendant's argument of the alleged nullity of his waiver of jury trial was made manifest by this boot-strapping. He argues that his waiver of jury trial fails because the supposed *quid pro quo* for the waiver—that the *Court* should later hold a hearing on fairness—was not complied with by the Court. If this position was tinged by the slightest *bona fides,* surely when defendant came to demand his *quid pro quo* from the District Judge he would have asked the Court to give him what he allegedly bargained for—his deferred hearing *before the Court.* But this defendant did not do so. By the time he came to demand his purported *quid pro quo,* defendant had had quite enough of this District Judge too. He demanded that the District Court set the supposedly deferred matter down before the Court, *and a jury* (60a).

The District Court asked both sides whether they were willing to have the determination made by the Court without a jury (226a). The District Court stated (227a):

> "I would do this on the same basis as before in so far as splitting it is concerned. There might be an interval in time between the *disposition on the 155* and on the adverse interest before further proceedings were taken. It has certain advantages." (Emphasis supplied).

Mr. Greenspoon said he had just one question in view of this statement and that related to whether the Court would continue to limit the proof and not allow the case to expand. To which the Court responded (227a):

> "I would limit the proof in the same way I have heretofore and I would at the point which I intended to take as the first set of issues to the jury stop at that point, permit findings, proposed findings, and memoranda and conclusions of law proposed to come in and *I would decide that and then decide whatever else had to be decided as a matter of law.*" (Emphasis supplied).

Mr. Greenspoon then said "The defendant agrees to waive the jury" (227a).

Defendant's waiver was absolute.

The Record is absolutely clear that at all times counsel and the parties knew that the waiver of jury trial was complete and that the Court alone would, under any circumstances, decide all of the issues. Thus, immediately after the jury waiver, the Court told counsel (228a):

> "Bring in the jury and we will dismiss them. I will tell them that it is agreed that this is to be henceforth a non-jury case."

The Court then told the jury (229a):

> "It is complicated both as to facts and it is complicated as to law and in the period between ten o'clock and the present minute counsel have agreed that it is, in substance, all to be tried before the Court without a jury and that means that I have various burdens, I will hear the case, take the testimony and counsel will submit proposed findings, or what they claim the facts are to be, and proposed law and I will have to decide, but I am inclined to think it is the better part of valor and that it is highly advisable and therefore you are discharged with the thanks of the Court for listening for some five days, at least, without this morning."

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Later during the trial, Judge Levet said (275a)

> The Court: I may reserve on it, and I am inclined to reserve on this motion made by Mr. Greenspoon with respect to the 155 in view of the fact that this is now a non-jury case.

Finally, during his final instructions to the counsel, Judge Levet again called the case "a non-jury case." (336a)

The Court of Appeals rejected defendant's jury waiver strategy as "meritless." It said (App. A, p. 14a):

> "We reject as meritless McFarland's argument that the denial of an opportunity to offer further evidence as to reasonableness had the effect of nullifying his waiver of a jury trial. The record is clear that while McFarland waived a jury on the understanding that there would be a deferred hearing as to the reasonableness issue, the waiver was abso-

> lute. The deferred hearing was not to be before a jury, but before Judge Levet sitting without a jury. Thus our remand gives McFarland the deferred non-jury hearing which he requested at the time when he waived a jury trial."

If, as we submit, defendant was entitled to no further hearing at all, then the Court of Appeals' decision in this respect was right, *a fortiori*. In any event, since the Court of Appeals granted to defendant the very hearing for which he said he had bargained, the defendant received all that he was entitled to have and had no right whatever to a wholly new trial before a different Court and jury.

POINT II

There was no error in considering testimony given in *McFarland* v. *Gregory*.

Another alleged error (Defendant's Question 3) upon which defendant relies centers on Judge Levet's citation in his Opinion of certain testimony given in the District Court in *McFarland* v. *Gregory*. That defendant has the hardihood to re-raise this issue—under the conditions which prevailed (and which defendant did not disclose to the Court of Appeals or to this Court)—is fantastic.*

On June 1, 1971, the District Court wrote to Plaintiff's counsel asking that they furnish the Court with a statement which would show "what inconsistencies by McFar-

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* This claimed error was a belated creation. The statement of issues for review (required by the Court of Appeals) did not even refer to it. (The pertinent portion of the statement is annexed to this Brief as Exhibit A.)

land existed with respect to the New York and Virginia action which were referred to in an affidavit [*in evidence in this case* (439a-443a)] of Friedman dated January 16, 1968 on the application for withdrawal." Counsel was asked to refer to sources or exhibits and to serve a copy upon opposing counsel—who received a copy of the Court's letter. The submission was prepared, served and filed (6a). It contained excerpts from trial testimony and other Court proceedings in the *McFarland* v. *Gregory* litigation in the Southern District of New York.

According to defendant, he had no "advance notice" (Petition, p. 18); he had not "been warned by the District Judge that he contemplated using this 'evidence', so that he could have taken appropriate steps * * *" (Petition, p. 19). According to defendant, he was not "allowed to confront or rebut" the material (p. 19).

The record proves that these assertions are pure fiction.

After defendant's counsel received the submission called for by the Court, *he wrote* a three page letter to the District Court. That letter, which defendant does not mention in his Petition, was dated June 8, 1971. It is attached to this Brief as Exhibit B.

In his letter, defendant's counsel attempted to explain away and harmonize the cited inconsistent McFarland testimony. Not only did he *not* challenge the accuracy of the material supplied to the Court from the Record in *McFarland* v. *Gregory,* not challenge the Court's right to take judicial notice of it,* and *not* seek further opportunity

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* It is plain that the District Court can take judicial notice of its own files. *Ira S. Bushey & Sons* v. *W. E. Hedger Transportation*

(*Footnote continued on following page*)

to explain it away, defendant himself offered Judge Levet *other* references *to the record in the same litigation*, and told Judge Levet that the District Court "of course may take judicial notice" thereof. The Court of Appeals' decision nailed this argument for what it was—"frivolous". The Court held (App. A, p. 10a):

> "Equally frivolous is McFarland's claim that Judge Levet committed reversible error in considering a portion of the transcript of McFarland's testimony in the Gregory suit, which was furnished by Friedman in response to a request made by the court on June 1, 1971, after both sides had rested. A copy of the statement was simultaneously furnished by Friedman to McFarland's counsel, who replied in a lengthy letter to Judge Levet dated June 8, 1971, which did not suggest that it would be improper for the court to receive or consider the transcript. If such an objection had been made, the court might have decided either not to consider

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(*Footnote continued from preceding page*)

Corporation, 167 F. 2d 912 (2d Cir. 1948); *Kalimian* v. *Liberty Mutual Fire Insurance Company*, 300 F. 2d 547, 549 (2d Cir. 1962); *I & I Holding Corporation* v. *Greenberg*, 151 F. 2d 570, 572 (2d Cir. 1945); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 445 (2d Cir. 1945).

FRCP Rule 46 requires objection at the risk of preclusion from raising the issue on appeal. *Slattery* v. *Marra Bros. Inc.*, 186 F. 2d 134, 137 (2d Cir. 1951); *Simpson* v. *Standard Oil Company*, 223 F. 2d 306, 308 (2d Cir. 1955); *Israel* v. *United States*, 247 F. 2d 426, 429 (2d Cir. 1957).

Furthermore the limited reference in the Court's decision to any materials from the *McFarland* v. *Gregory* record was not prejudicial to defendant in any way—and defendant claims no prejudice. The substance of the material was contained in other evidence unarguably properly in the record of the case (*supra*, p. 34 *et seq.*).

it or to reopen the record *sua sponte* and hold a further hearing. McFarland's counsel, however, sought instead to persuade the court that the evidence was not relevant because the portion of McFarland's testimony in the Gregory suit furnished to the court referred to a point in time prior to Johnson's transfer of his interest to McFarland and because in any event it had been implicitly rejected by Judge Dimock's later opinion and decree. Regardless of the lack of merit in these arguments, it is readily apparent that McFarland waived the objection now advanced by him."

This late-starter "error" was and is a sham.

POINT III

The District Court and the Court of Appeals were clearly correct in rejecting the adverse interest charges.

Apart from what has been summarized hereinabove with respect to the grounds of the District Court's dismissal of the ethical charges (*supra*, p. 17 *et seq.*), and the Court of Appeals' affirmance (App. A, p. 7a, *et seq.*), we add only the following:

1. Defendant's Counterclaim, and much of what he says in his Petition, attempt to convey the impression that he was the sole client of Tanner & Friedman in respect of the representation undertaken by that firm. Defendant tries to recast Johnson as a virtual stranger to that representation.

The Record, Judge Levet's findings, and the Court of Appeals' Opinion demonstrate the contrary. McFarland

and Johnson together retained Tanner & Friedman and were their co-clients (Tr. 101-05, 965, 183a-188a, Tr. 774, 212a, 315a, 389a, Ex. 7). That fact was stipulated by defendant (357a, 89a, 94a).

2. Although the Canons and the cases* define the attorney's duty to the client as co-extensive with and limited to those interests of the client which the attorney is retained to prosecute or defend, all of defendant's charges against Tanner and Friedman involve alleged adversity to interests of the defendant with respect to which Tanner and Friedmn had never been retained, i.e., defendant's relationship *inter se se* with Johnson.**

Tanner and Friedman, as the pleadings and admissions establish, and as the District Court found, were retained as McFarland and Johnson's attorneys ". . . in connection with the enforcement of their claims and rights against the Gregory Group . . ." (App. A, p. 26a).

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* Canons of Legal Ethics, 6, 16, 22, 32, 41, 44; *Matter of Dix*, 21 Misc. 2d 864 (Surr. Rensselaer Co. 1959, 1960), aff'd 11 App. Div. 2d 555 (Third Dept. 1960); *Matter of Seilcken*, 162 Misc. 54 (Surr. New York Co. 1937); *Eisenmann* v. *Hazard*, 218 N. Y. 155 (1916); *Ellerd* v. *Randolph*, 138 S. W. 1171 (Civil Appeals, Texas 1911); *American-Canadian Oil & Drilling Corp.* v. *Aldridge & Stroud, Inc.*, 327 Ark. 376, 373 S. W. 2d 148 (1963).

** As the District Court found, Tanner and Friedman owed Johnson, the co-client, the obligation to supply him with copies of papers which they had received in the course of the joint representation. *Matter of Trybom*, 168 Misc. 484 (Surr. Westchester Co. 1938); *Matter of Youngentob*, 181 App. Div. 490, 493 (First Dept. 1918). The fact that defendant regarded that Tanner and Friedman's compliance with this professional duty ran counter to his interests in his later-launched Virginia litigation with Johnson cannot make into an ethical breach that which otherwise was a duty. See App. A, p. 9a.

3. Defendant's charges with respect to "adverse interest" on the withdrawal application founder on the fact that they represent bald misstatements of what was involved before Judge Dimock and what he said. Judge Levet so found (App. A, pp. 50a-51a), and the Court of Appeals agreed (App. A, pp. 10a, 14a-15a).

Even more important, the entire spectrum of defendant's charges of adverse interest founders upon the fact that defendant *conceded*—as indeed he had to, for the evidence corroborated the concession—that there was nothing done, or not done, by Tanner and Friedman *in respect of their representation of the clients in the Gregory litigation* which constituted adversity *with respect to that representation.*

Judge Levet asked, and defendant's counsel stated (251a-52a):

> "The Court: There is no claim, is there, Mr. Greenspoon, that there was an adverse interest in the New York action?
>
> Mr. Greenspoon: Not per se, not in the New York action. One of the facts admitted here, is that McFarland and Johnson retained this firm to handle the Arlington Towers problems in New York.
>
> The Court: You don't contend that per se as you call it, there is anything wrong about Tanner and Friedman representing them in this action or anything in the action itself, do you?
>
> Mr. Greenspoon: No, sir."
>
> • • •
>
> "The Court: . . . *There is no claim here,* as Mr. Greenspoon has just said, *about anything being wrong in the* [*New York*] *action itself.*" (emphasis supplied)

That concession by itself mandated dismissal of the defense and counterclaim.

The Court of Appeals stated (App. A, p. 9a):

> "We agree with Judge Levet's conclusion that Tanner and Friedman did not place themselves in the position of representing interests adverse to their representation of McFarland in his suit against the Gregory group."

4. In light of the District Court's rejection of defendant's charges of adverse interest and the Court of Appeals affirmance, there was no occasion to pass upon the validity of defendant's claim that his charges, if proved, (a) constituted a complete defense to the plaintiff's claims and (b) required a refund to defendant of all fees theretofore paid by him to counsel. The case law, however, was absolutely contrary to defendant's contentions even in cases where charges of adverse interest had been proven. *Ruzzo* v. *Kingston Trust Co.*, 10 App. Div. 2d 512 (Third Dept. 1960); *Mook* v. *Merdinger*, 18 App. Div. 2d 983 (First Dept. 1963); *McKeon* v. *Smith*, 236 App. Div. 745 (Second Dept. 1932); *Rippey* v. *Wilson*, 280 Mich. 233, 273 N. W. 552 (1937); *Odom* v. *Hilton*, 105 Ga. App. 286, 124 S. E. 2d 415 (Court of Appeals, Div. 1 1962).

CONCLUSION

If this Court were transmuted into a Court of Appeals, we submit that nothing contained in the Petition would cause the Court in the slightest degree to disturb the determinations made hereinbelow. Where, as here, the underlying points advanced by defendant not only lack legal merit as well as factual foundation, but lack as well any remote relationship to the additional requirements for certiorari jurisdiction, the Petition should be in all respects denied.

Respectfully submitted,

LESTER J. TANNER and
ARTHUR S. FRIEDMAN
Attorneys for Respondents
99 Park Avenue
New York, N. Y. 10016

Exhibit A

"Please take further notice that said Appellant intends to present for review the following issues:

1. The Judge, at the behest of Tanner & Friedman, improperly decided an issue which had been deferred for trial, to wit, the issue of reasonableness of the $155,000 bonus.

2. The trial below was a nullity in that the express condition on which defendant agreed to waive the jury was breached.

3. Tanner & Friedman are not entitled to recover for services relating to their withdrawal motion.

4. Adverse interest.

Dated: New York, N. Y.
October 8, 1971

Yours, etc.

EATON, VAN WINKLE & GREENSPOON
Attorneys for Defendant
By /s/ Samuel N. Greenspoon
A member of the firm
Office & P. O. Address
201 East 42nd Street
New York, N. Y. 10017
867-0606

To: Tanner & Friedman, Esqs.
Attorneys for Plaintiffs
99 Park Avenue
New York, N. Y. 10016"

Exhibit B

June 8, 1971

"Hon. Richard H. Levet
United States District Judge
United States District Court
Southern District of New York
Foley Square
New York, N. Y. 10007

Re: *Knapp* v. *McFarland*
69 Civ. 2590

Dear Judge Levet:—

I have received a copy of plaintiffs' statement in response to your Honor's letter dated June 1, 1971.

Although your Honor did not indicate that I should answer the statement, I feel that I can be helpful in resolving the issues in a short letter.

The only case which was pending at the time when Tanner & Friedman made their application to withdraw in January 1968 was the so-called 'compensation hearing' before Judge Dimock. At that point, plaintiff's case had been rested and the *Gregory* defendants had moved to dismiss the complaint for failure to make out a prima facie case.

The McFarland testimony which Tanner & Friedman quote (pp. 17-20), is not relevant to the inquiry. As is perfectly evident from the testimony Mr. McFarland was testifying about an interest which existed in Mr. Loughran and Mr. Johnson at at time when one or both of them did have an interest. However, that interest did not survive the

making of the memorandum agreement which vested the rights under paragraphs 7, 8 and 9 solely in McFarland.

The short answer to all of Tanner & Friedman's contentions is Judge Dimock's opinion dismissing the complaint and the judgment entered thereon, after the compensation trial. Judge Dimock's opinion is dated May 13, 1968 and the supplemental judgment and decree was entered on May 27, 1968. This Court of course may take judicial notice of both the opinion and decree.

In his opinion Judge Dimock made it perfectly clear that the only claim for compensation which was tried before him were claims owned by McFarland.

Throughout his opinion Judge Dimock referred to 'plaintiff' and he stated 'Plaintiff is the one referred to therein [in the *Gregory* agreement] as McFarland'.

Throughout his opinion Judge Dimock referred to McFarland and to plaintiff as owning the rights which were the subject of the compensation hearing before him.

Thus, Judge Dimock's opinion and judgment are consistent with Judge Dimock's rulings made on January 30 and January 31, 1968 that only McFarland had any interest in the compensation trial and that only McFarland was before the Court as a plaintiff unless possibly Mr. Johnson had some interest with respect to an apartment or damages flowing from his leasehold on the apartment. But the rights of Mr. Johnson to the apartment did not

arise under paragraphs 6, 7, 8 and 9 of the agreement but under a separate provision thereof.

I should also like to point out that Canon 44 which Tanner & Friedman quote (br. p. 33) is of no help to them. This canon provides that '. . . if a client insists upon an unjust or immoral course in the conduct of his case, . . . the lawyer may be warranted in withdrawing. . . .'.

Whatever McFarland was insisting upon in the Virginia action is was not in any case in which Tanner & Friedman were representing McFarland. Hence, regardless of McFarland's conduct in the Virginia action, it was not 'unjust or immoral course in the conduct of his case'.

I respectfully submit that Tanner & Friedman have failed to offer any evidence or basis with respect to either of the questions asked by the Court.

Respectfully yours,

SAMUEL N. GREENSPOON

SNG/fd
cc: Tanner & Friedman, Esqs."